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6 **IN THE UNITED STATES DISTRICT COURT**

7 **FOR THE DISTRICT OF ARIZONA**

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9 Galen Lloyd Houser,

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No. CV 09-0937-PHX-GMS (ECV)

10 Plaintiff,

11 **ORDER**

12 vs.

13 Caron Grant-Ellis, et al.,

14 Defendants.

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16 Plaintiff Galen Lloyd Houser brought this civil rights action under 42 U.S.C. § 1983

17 against Nurse Caron Grant-Ellis and Physician's Assistant Nick Salyer, medical personnel

18 at the Arizona Department of Corrections (ADC) Florence Unit Complex (Doc. 9).<sup>1</sup> Before

19 the Court are Defendants' Motion for Summary Judgment (Doc. 52) and Plaintiff's Motion

20 for Appointment of Counsel (Doc. 64).

21 The Court will grant Defendants' motion, deny Plaintiff's motion as moot, and

22 terminate the action.

23 **I. Background**

24 In his First Amended Complaint, Plaintiff alleged that he suffers from severe

25 psoriasis, and that upon his arrival at the Florence South Unit following hospitalization for

26 his condition, he was supposed to be treated pursuant to a specific treatment plan that

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<sup>1</sup>Upon screening, the Court dismissed Baird and McMorran as Defendants (Doc. 10).

1 required medications, blood tests, and constant monitoring (Doc. 9 at 4).<sup>2</sup> Plaintiff claimed  
 2 that Defendants failed to provide the prescribed treatment plan or respond to repeated appeals  
 3 for treatment. Plaintiff alleged that as a result, he suffered painful infections and was  
 4 rehospitalized (*id.*).

5 Defendants now move for summary judgment on the grounds that (1) neither  
 6 Defendant was deliberately indifferent to Plaintiff's medical needs, (2) Plaintiff did not show  
 7 a substantial injury, (3) the Eleventh Amendment bars Plaintiff's official-capacity claims, and  
 8 (4) Plaintiff's punitive damages claim is unsupported (Doc. 52). Plaintiff opposes  
 9 Defendants' motion (Doc. 56).

## 10 **II. Legal Standards**

### 11 **A. Summary Judgment**

12 A court must grant summary judgment "if the movant shows that there is no genuine  
 13 dispute as to any material fact and the movant is entitled to judgment as a matter of law."  
 14 Fed. R. Civ. P. 56(a); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). Under  
 15 summary judgment practice, the movant bears the initial responsibility of presenting the basis  
 16 for its motion and identifying those portions of the record, together with affidavits, that it  
 17 believes demonstrate the absence of a genuine issue of material fact. *Celotex*, 477 U.S.  
 18 at 323.

19 If the movant meets its initial responsibility, the burden then shifts to the nonmovant  
 20 to demonstrate the existence of a factual dispute and that the fact in contention is material,  
 21 i.e., a fact that might affect the outcome of the suit under the governing law, and that the  
 22 dispute is genuine, i.e., the evidence is such that a reasonable jury could return a verdict for  
 23 the nonmovant. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 250 (1986) ; *see Triton*  
 24 *Energy Corp. v. Square D. Co.*, 68 F.3d 1216, 1221 (9th Cir. 1995). The nonmovant need  
 25 not establish a material issue of fact conclusively in its favor, *First Nat'l Bank of Ariz. v.*  
 26 *Cities Serv. Co.*, 391 U.S. 253, 288-89 (1968); however, it must "come forward with specific  
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28 <sup>2</sup>Plaintiff is currently housed in the Arizona State Prison Complex-Winchester Unit  
 in Tucson, Arizona (Doc. 18).

facts showing that there is a genuine issue for trial.” Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986) (internal citation omitted); see Fed. R. Civ. P. 56(c)(1).

At summary judgment, the judge’s function is not to weigh the evidence and determine the truth but to determine whether there is a genuine issue for trial. Anderson, 477 U.S. at 249. In its analysis, the court must believe the nonmovant’s evidence, and draw all inferences in the nonmovant’s favor. Id. at 255.

### **B. Eighth Amendment**

To prevail on an Eighth Amendment medical care claim, a prisoner must demonstrate “deliberate indifference to serious medical needs.” Jett v. Penner, 439 F.3d 1091, 1096 (9th Cir. 2006) (citing Estelle v. Gamble, 429 U.S. 97, 104 (1976)). There are two prongs to the deliberate-indifference analysis. First, a prisoner must show a “serious medical need.” Jett, 439 F.3d at 1096 (citations omitted). A “‘serious’ medical need exists if the failure to treat a prisoner’s condition could result in further significant injury or the ‘unnecessary and wanton infliction of pain.’” McGuckin v. Smith, 974 F.2d 1050, 1059 (9th Cir. 1992), overruled on other grounds, WMX Techs., Inc. v. Miller, 104 F.3d 1133, 1136 (9th Cir. 1997) (en banc) (internal citation omitted). Examples of a serious medical need include “[t]he existence of an injury that a reasonable doctor or patient would find important and worthy of comment or treatment; the presence of a medical condition that significantly affects an individual’s daily activities; or the existence of chronic and substantial pain.” McGuckin, 974 F.2d at 1059-60.

Second, a prisoner must show that the defendant’s response to that need was deliberately indifferent. Jett, 439 F.3d at 1096. This second prong is met if the prisoner demonstrates (1) a purposeful act or failure to respond to a prisoner’s medical need and (2) harm caused by the indifference. Id. Prison officials are deliberately indifferent to a prisoner’s serious medical needs if they deny, delay, or intentionally interfere with medical treatment. Wood v. Housewright, 900 F.2d 1332, 1334 (9th Cir. 1990). But a delay in providing medical treatment does not constitute an Eighth Amendment violation unless the

1 delay was harmful. Hunt v. Dental Dep't, 865 F.2d 198, 200 (9th Cir. 1989) (citing Shapley  
 2 v. Nevada Bd. of State Prison Comm'rs, 766 F.2d 404, 407 (9th Cir. 1985) (per curiam)).

### 3 **III. Facts**

4 With their summary judgment briefing, the parties each submit an extensive, separate  
 5 Statement of Facts, which, together, are supported by approximately 400 pages of exhibits,  
 6 including numerous Health Needs Requests (HNRs) seeking prescription refills and  
 7 appointments with physicians, who are referred to as health care providers (HCP);<sup>3</sup> medical  
 8 records, and grievance documents (Doc. 53, Defs.' Statement of Facts (DSOF); Doc. 57, Pl.'s  
 9 Statement of Facts (PSOF)). The parties do not dispute many of the factual assertions, which  
 10 document in great detail Plaintiff's healthcare from 2006-2009 (id.).

#### 11 **A. Undisputed Facts**

12 The relevant undisputed factual assertions are summarized as follows:

13 Psoriasis is a chronic, non-curable skin condition that causes rapid skin cell  
 14 reproduction resulting in red, dry patches of thickened skin (DSOF ¶ 4; PSOF ¶ 4). Psoriasis  
 15 treatments attempt to interrupt the cycle that causes an increased production of skin cells,  
 16 thereby reducing inflammation and plaque formation and smoothing the skin. Treatment  
 17 usually involves a combination of topical medication—such as corticosteroids—and oral  
 18 medications—commonly methotrexate (DSOF ¶ 5; PSOF ¶ 5). Side effects of long-term  
 19 methotrexate treatment can include liver damage, cancer, and a reduced white blood cell  
 20 count (DSOF ¶ 6; PSOF ¶ 6). Regular blood tests are taken to ensure that the drug is safely  
 21 processed by the liver and blood cells (id.).

22 At the ASPC-Florence South Unit, Salyer was Plaintiff's primary HCP from  
 23 December 21, 2006 through October 23, 2009, at which time Plaintiff was transferred to  
 24 another prison complex (DSOF ¶ 16; PSOF ¶ 16). From 2005 until July 2009, Grant-Ellis  
 25 was assigned to ASPC-Florence and worked as the Correctional Registered Nurse Supervisor  
 26 (DSOF ¶ 2; PSOF ¶ 2).

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28 <sup>3</sup>Physician's assistants—like Salyer—and nurse practitioners are also considered  
 HCPs (Doc. 53, Ex. B, Grant-Ellis Decl. ¶ 2).

1 With respect to medical care at the South Unit, when an inmate needs non-emergency  
2 medical care or treatment, he must fill out an HNR, which is reviewed by the nursing staff,  
3 who then either (1) respond as appropriate, (2) make an appointment to the nurses' or  
4 doctors' schedule, (3) refer the HNR for a chart review, or (4) refer the HNR for review by  
5 an HCP (DSOF ¶ 7; PSOF ¶ 7).

6 When an HCP prescribes a medication, the HCP indicates in his or her notes how  
7 many refills are needed, if any (DSOF ¶ 12; PSOF ¶ 12 (in part)<sup>4</sup>). Then, a nurse faxes the  
8 note to the pharmacy, which is responsible for filling the prescription (DSOF ¶ 12). The  
9 pharmacy sends the filled prescription back to the medical unit, and the nursing staff  
10 distributes it to the inmate (id.). If an inmate needs a refill, he must submit an HNR to the  
11 pharmacy (id.). If the inmate needs more medication but does not have a refill, he must  
12 submit an HNR to request to see an HCP, who may then reorder the medication (id.).

13 Plaintiff arrived at the South Unit on December 21, 2006 (Doc. 53, Ex. A at 1 (ADC  
14 Inmate Record)). Salyer examined Plaintiff on December 28, 2006; Salyer noted that  
15 Plaintiff had been hospitalized for a psoriasis flare prior to his incarceration, but he was now  
16 okay (DSOF ¶ 18; PSOF ¶ 18 (in part)). Plaintiff was already taking methotrexate in  
17 subsequently lower doses as well as prednisone—a synthetic corticosteroid drug (id.). Salyer  
18 prescribed methotrexate weekly in subsequently lower doses for four weeks (id.). He also  
19 prescribed psoriasis shampoo; Lidex cream (a topical adrenocortical steroid); triamcinolone  
20 (TAC) cream (a topical steroid); Carmol lotion for six months; Pepcid; Tums; extra-strength  
21 Tylenol; and Phenergan (id.). Salyer further ordered that blood tests be done in four to six  
22 weeks (id.).

23 During the next three years, Salyer continued to prescribe these medications to  
24 Plaintiff in varying doses, and at different times he also prescribed ointments, Flexeril,  
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26 <sup>4</sup>In his PSOF, Plaintiff states that he disagrees with DSOF ¶ 12 (PSOF ¶ 12). But he  
27 does not explicitly dispute the prison's established process for prescribing, filling, and  
28 refilling prescriptions. Instead, Plaintiff asserts that if there is a problem related to the  
pharmacy, and prison medical staff are aware of the problem but take no corrective action,  
it constitutes a denial of treatment (id.).

Kenalog (a steroid injection), Medrol Dosepack (an oral steroid), prednisone, antibiotics, Prilosec, Meclomen (an anti-inflammatory drug), Inderal (a beta-blocker), and Cafergot (for migraines) (see DSOF ¶¶ 23, 29, 37, 48, 54, 61, 69, 80; PSOF ¶¶ 23 (in part), 29, 37 (in part), 48 (in part), 54, 61, 69, 80 (in part)).

Plaintiff regularly submitted HNRs requesting prescription refills for these various medications; he averaged 2-5 HNRs for refills per month (DSOF ¶¶ 20, 24, 30, 39, 44, 47, 59, 63, 65, 70, 75, 79, 81; PSOF ¶¶ 20, 24, 30, 39, 44, 47, 59, 63, 65, 70, 75 (in part), 79, 81 (in part)). Plaintiff also regularly submitted HNRs requesting to see a physician about renewing medications (DSOF ¶¶ 26, 33, 73, 85; PSOF ¶¶ 26 (in part), 33, 73, 85); because his medications were not being filled as ordered (DSOF ¶ 22; PSOF ¶ 22); he was not getting refills (DSOF ¶¶ 38, 42, 44, 88, 90; PSOF ¶¶ 38, 42, 44, 88, 90); and he was not receiving blood tests as ordered (DSOF ¶¶ 34, 36 38, 42, 68; PSOF ¶¶ 34, 36, 38, 42, 68 (in part)).

On December 27, 2007, Plaintiff was admitted to St. Mary's Hospital (DSOF ¶ 52; PSOF ¶ 52). He was discharged three days later after treatment for a suspected migraine, abdominal pain, psoriasis, and anemia (id.).

#### **B. Disputed Issues**

The parties dispute whether Grant-Ellis was responsible for determining which inmates were approved for the one-day-a-week doctors' schedule and whether she was aware of the allegedly inadequate supply of medications and treatment for Plaintiff but disregarded the problem (Doc. 56 at 2). They also dispute whether Salyer was aware of the allegedly inadequate supply of medications and treatment for Plaintiff, whether he failed to take any corrective action to address the situation or establish a new drug treatment, and whether Salyer maintained Plaintiff's treatment plan or took any action to address the lack of blood testing (id.).

#### **IV. Analysis**

The Court notes that Defendants make no argument that Plaintiff did not suffer from a serious medical need. See Jett, 439 F.3d at 1096. Indeed, Defendants' own evidence

1 reflects that Plaintiff's condition warranted ongoing treatment, including prescription  
2 medication and regular blood testing. Thus, the deliberate-indifference analysis turns on  
3 whether Grant-Ellis and Salyer were deliberately indifferent to Plaintiff's serious medical  
4 need.

5 **A. Grant-Ellis**

6 In her declaration, Grant-Ellis states that as the Correctional Registered Nurse  
7 Supervisor, she was responsible for staffing and overseeing subordinate nursing staff and she  
8 performed health assessments and triage of patients (Doc. 53, Ex. B, Grant-Ellis Decl. ¶ 2).  
9 Her duties included referring inmates to be seen by HCPs; however, she did not actually  
10 schedule inmates to be seen by an HCP (*id.*). But if an inmate had an emergency or a critical  
11 medical need, Grant-Ellis could add the inmate to the doctors' schedule for immediate  
12 treatment depending on the severity and urgency of the need (*id.* ¶ 5). In her position, she  
13 did not dictate inmate medical care, order lab work, or prescribe medications (*id.* ¶ 3).

14 As to her involvement with Plaintiff's care, Grant-Ellis declares that it was limited.  
15 She reviewed Plaintiff's HNR for refills in December 2006, and reviewed his chart a few  
16 days later, at which time she sent his prescriptions to the pharmacy and sent the blood work  
17 order to the lab (*id.* ¶¶ 9-10). In August 2007, she noted in Plaintiff's medical record that he  
18 requested a renewal of two medications, and she placed his chart for review by an HCP (*id.*  
19 ¶ 11). Grant-Ellis states that she saw Plaintiff on December 6, 2007, and he complained  
20 about his deteriorating psoriasis and improper methotrexate regimen; she referred him for an  
21 HCP appointment (*id.* ¶ 12). Around that same time, in early December 2007, Grant-Ellis  
22 responded to a CO III who was investigating an inmate letter/grievance that Plaintiff filed  
23 about medication; she told the CO III that she tried to call the pharmacy and got no answer  
24 but she would contact the pharmacy again (*id.* ¶ 13). On December 12, 2007, following  
25 Plaintiff's appointment with an HCP, Grant-Ellis reviewed Plaintiff's chart and confirmed  
26 that his prescriptions were sent to the pharmacy (*id.* ¶ 14). She also responded to Plaintiff's  
27 inmate letter regarding the lack of TAC for two weeks in late December 2007 (*id.* ¶ 15).  
28 Finally, once in March 2008 and once in February 2009, Grant-Ellis received HNRs from



1 Plaintiff for refills; she faxed them both to the pharmacy (id. ¶¶ 16-17).

2 Defendants argue that this evidence precludes any finding of deliberate indifference  
3 by Grant-Ellis (Doc. 52 at 6).

4 In response, Plaintiff cites to his First Amended Complaint and reiterates his claim  
5 against Grant-Ellis; specifically, that he complained to her about his medication  
6 approximately 10 times and that she scheduled inmates to see HCPs for emergencies and  
7 general care (Doc. 56 at 8-9). According to Plaintiff, the evidence shows that Grant-Ellis  
8 controlled who saw physicians and that she scheduled inmates “as it pleased her” (id. at 9).  
9 He further contends that she ignored the problems with blood work lab orders and  
10 prescription medication (id.). Lastly, he asserts that Grant-Ellis had more than limited  
11 contact with Plaintiff; he states that she regularly handled his medical records and  
12 prescription orders and failed to correct the problems that she knew existed with his  
13 treatment (id.).

14 Plaintiff does not point to any specific documents within the hundreds of pages in the  
15 record to support these contentions. On summary judgment, the Court is “not required to  
16 comb the record to find some reason to deny a motion for summary judgment.” Carmen v.  
17 San Francisco Unified Sch. Dist., 237 F.3d 1026, 1029 (9th Cir. 2001) (citation omitted);  
18 Fed. R. Civ. P. 56(c)(3); see Huey v. UPS, Inc., 165 F.3d 1084, 1085 (7th Cir. 1999) (“judges  
19 need not paw over the files without assistance from the parties”). Nonetheless, in giving  
20 Plaintiff the benefit of any doubt, the Court has reviewed the documents Plaintiff submitted  
21 and finds that copies of HNRs show that on a number of occasions, he did not receive timely  
22 refills; that sometimes he had to make repeated written requests for the same medication  
23 refills; and that sometimes he went days or weeks without some medications due to delays  
24 (see e.g., Doc. 57, Attachs. 11, 13-16). Defendants do not refute Plaintiff’s claims regarding  
25 these delays (see Doc. 61), and none of their evidence appears to show when prescription  
26 medication was distributed to Plaintiff after it was filled by the pharmacy and sent to the  
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1 medical unit (see Doc. 53, DSOF ¶7).<sup>5</sup>

2 Plaintiff's evidence also includes a number of grievance documents. In a February  
3 2008 grievance response, the Facility Health Administrator acknowledged Plaintiff's  
4 concerns about staff conduct and demeanor and informed Plaintiff that he will remind staff  
5 "of the need to conduct themselves in a professional manner regarding patient care and  
6 interactions" (id., Attach. 25). In an April 2008 grievance response, prison staff  
7 acknowledged that there was a previous mistake with Plaintiff's medication order (id.,  
8 Attach. 21). There are a number of documents that specifically refer to Grant-Ellis: (1) in  
9 a December 4, 2007 grievance, Plaintiff complained that Grant-Ellis permitted delays and  
10 interruptions in the receipt of his prescription medications (id., Attach. 11); (2) in an April 1,  
11 2008 grievance document about failure to receive prescribed methotrexate and the lack of  
12 blood testing, Plaintiff wrote that he discussed the issue with Grant-Ellis (id., Attach. 14);  
13 (3) in a February 2009 grievance, Plaintiff complained that dosages were incorrect and he  
14 had not received methotrexate, and he wrote that he discussed these problems with Grant-  
15 Ellis (id., Attach. 20); (4) in a March 9, 2009 grievance, Plaintiff wrote that Grant-Ellis  
16 confirmed that refill orders were handled improperly (id.); and (5) in a August 31, 2009  
17 grievance, Plaintiff wrote that Grant-Ellis failed to order his prescription cream (id., Attach.  
18 24).

19 Viewing this evidence in the light most favorable to Plaintiff, Grant-Ellis was aware  
20 or should have been aware of some of the problems Plaintiff encountered when trying to  
21 obtain medication refills. But there is no evidence that Grant-Ellis was aware of every  
22 delayed refill and blood test or that she should have been aware of these problems but refused  
23 to acknowledge them. Moreover, the evidence shows that, at least on some occasions, she  
24 responded to Plaintiff's concerns. In response to the December 2007 grievance, Grant-Ellis  
25 contacted the pharmacy twice to follow-up on Plaintiff's refill (id., Attach. 11; Doc. 53, Ex.  
26 B, Grant-Ellis Decl. ¶ 13). To the extent that Grant-Ellis may not have timely responded to  
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28 <sup>5</sup>The HNR forms show only the date that a request for refill was faxed to the pharmacy  
(see e.g., Doc. 53, Attachs. 11, 19).

1 some of the other refill delays, Plaintiff proffers no evidence that her conduct was more than  
2 negligent, which is not actionable under § 1983. Toguchi v. Chung, 391 F.3d 1051, 1060-61  
3 (9th Cir. 2004) (neither medical malpractice nor negligence is sufficient to establish a  
4 constitutional violation); O'Loughlin v. Doe, 920 F.2d 614, 617 (9th Cir. 1990) (isolated  
5 occurrences of neglect may constitute grounds for malpractice but they do not amount to a  
6 constitutional violation).

7 Plaintiff alleges that he suffered infections on his leg due to delays in and interruption  
8 of medication treatment, and he claims that had Grant-Ellis taken proper action and had he  
9 received medications without interruption, he would not have been hospitalized in late  
10 December 2007 (Doc. 56 at 12). But, again, Plaintiff does not cite to any specific evidence  
11 in the record to support this claim. The records show that Grant-Ellis saw Plaintiff on  
12 December 6, 2007; she states that she referred Plaintiff for an appointment with an HCP,  
13 which occurred on December 12, 2007 (Doc. 53, DSOF ¶¶ 45, 48). Plaintiff disputes that  
14 the HCP appointment resulted from Grant-Ellis' referral; he claims that it occurred in  
15 response to his grievance (Doc. 57, PSOF ¶¶ 45, 48). Even assuming that Grant-Ellis did not  
16 set up the appointment with the HCP, it is immaterial because Plaintiff did see the HCP, and  
17 Plaintiff does not dispute that Grant-Ellis reviewed Plaintiff's chart following that  
18 appointment and sent his prescriptions to the pharmacy (Doc. 53, DSOF ¶ 49; Doc. 57, PSOF  
19 ¶ 49). Further, the hospital medical records do not include any information suggesting that  
20 a disruption of medication or other delays in care led to the need for hospitalization (Doc. 57,  
21 Attach. 12). Plaintiff's sweeping, conclusory allegations that Grant-Ellis' conduct led to his  
22 hospitalization are insufficient to defeat summary judgment. See Rizzo v. Goode, 423 U.S.  
23 362, 371, 377 (1976) (there must be an affirmative link between a defendant's action and the  
24 claimed deprivation); Leer v. Murphy, 844 F.2d 628, 634 (9th Cir. 1988) (to establish  
25 deliberate indifference, the prisoner must establish individual fault).

26 On the record before the Court, there is no competent evidence to support Plaintiff's  
27 general allegation that Grant-Ellis "knowingly and deliberately limit[ed] [Plaintiff's] access  
28 to health care and failed to correct problems which she did know existed" (Doc. 56 at 9).

1 Carmen, 237 F.3d at 1028 (“a plaintiff’s belief that a defendant acted from an unlawful  
 2 motive, without evidence supporting that belief, is no more than speculation or unfounded  
 3 accusation about whether the defendant really did act from an unlawful motive”). The  
 4 summary judgment determination cannot be based on unsupported allegations and  
 5 speculation. See id.; Taylor v. List, 880 F.2d 1040, 1045 (9th Cir. 1989). Accordingly,  
 6 although the Court is troubled by the difficulties that Plaintiff encountered when seeking  
 7 medication refills, there is no probative evidence to establish a genuine issue of material fact  
 8 that Grant-Ellis was deliberately indifferent to Plaintiff’s medical needs.

### 9 **B. Salyer**

10 During his time as Plaintiff’s primary HCP from December 2006 through October  
 11 2009, Salyer examined Plaintiff seven times (Doc. 53, DSOF ¶¶ 18, 23, 29, 37, 48, 69, 80;  
 12 Ex. C, Salyer Decl. ¶ 10).<sup>6</sup> The parties dispute whether some of these examinations were set  
 13 up in response to Plaintiff’s HNRs requesting to see an HCP—as Defendants suggest, or in  
 14 response to Plaintiff’s initiation of the grievance process regarding his inability to get  
 15 medical care—as Plaintiff claims (Doc 57, PSOF ¶¶ 23, 37, 48). The Court agrees with  
 16 Defendants that this dispute is immaterial (see Doc. 61 at 2). And, notably, Plaintiff does not  
 17 dispute Defendants’ description of the HNR process for inmates seeking medical care nor  
 18 does he set forth any allegations challenging that process as unconstitutional (see Doc. 53,  
 19 DSOF ¶ 7; Doc. 57, PSOF ¶ 7).

20 At issue is whether Salyer was aware of the difficulties and repeated delays in  
 21 obtaining medication refills and blood tests and whether he failed to respond to those  
 22 problems. First, as to Plaintiff’s blood tests, the evidence shows that there were just a few  
 23 times when he did not receive regular testing. Defendants submit copies of all the lab reports  
 24 during the relevant time, which show that through 2007, there were just two gaps between  
 25 blood tests that exceeded one month; otherwise, Plaintiff had testing done every month (Doc.  
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27 <sup>6</sup>Those examination dates were December 28, 2006; January 29, 2007; March 22,  
 28 2007; September 10, 2007; December 12, 2007; July 9, 2008; and March 2, 2009 (Doc. 53,  
 DSOF ¶¶ 18, 23, 29, 37, 48, 69, 80).

53, Ex. B, Attachs. 3, 7, 10, 12, 20-21, 23, 27 (gaps were from April 24 to July 21, 2007, and from July 21, to September 15, 2007)). In 2008 and 2009, blood tests were administered approximately every 2-3 months (id., Attachs. 31, 40, 47-48, 53, 57, 63). Salyer declares that he reviewed the lab reports for each of Plaintiff's blood tests (id., Ex. C, Salyer Decl. ¶¶ 13, 17, 20, 23, 28, 31, 34, 43, 50-51, 58-59, 64, 68, 75). Plaintiff does not dispute any of this evidence (see Doc. 57, PSOF ¶¶ 21, 25, 28, 31, 40-41, 43, 55, 62, 71-72, 77, 82, 89). Plaintiff asserts that, at times, to get his blood tests done, he had to initiate the grievance process (Doc. 56 at 1; Doc. 57, Attachs. 10-11, 14, 16, 17). While that may have been the case, Plaintiff nonetheless received regular blood tests to monitor whether methotrexate was affecting his liver or blood cells, and Salyer reviewed those test results. Notably, there is no evidence that Plaintiff experienced liver damage or a reduced white blood cell count in response to the methotrexate treatment and that these symptoms were missed or ignored due to inadequate blood testing.

As mentioned, Plaintiff's evidence reflects that he regularly encountered delays in obtaining refills of his medication. Plaintiff asserts that at each appointment with Salyer, they reviewed the HNRs together, and Plaintiff complained about the delays and inadequate supply of medication. Plaintiff states that Salyer simply rewrote new prescriptions and avoided addressing the medication problem with Grant-Ellis (Doc. 56 at 9-10). Plaintiff further alleges that Salyer responded to Plaintiff's concerns by stating that he was sorry but he had done his job and "after its out of my office, its not my problem" (id. at 10).

In his declaration, Salyer acknowledges that when he examined Plaintiff, Plaintiff often expressed his concerns about the pharmacy's failure to renew prescriptions and that he was not getting some medications (Doc. 53, Ex. C, Salyer Decl. ¶¶ 15, 21, 56, 66). Salyer also refers to all of Plaintiff's HNRs requesting refills, some of which complain about late refills and/or the lack of medication due to delays (see e.g., id. ¶¶ 14, 22, 29, 37, 62). The inference from this evidence is that Salyer was aware of Plaintiff's recurrent difficulties in obtaining refills of his prescription medication. There is no indication that Salyer followed-up with the pharmacy or confronted Grant-Ellis about the refill delays, as Plaintiff felt he

1 should have done. The record appears to support Plaintiff's claim that in response to his  
2 concerns, Salyer often just wrote new prescriptions for medication (id. & Attachs. 5, 9, 45,  
3 55).

4 Arguably, Salyer may have been able to do more to address apparent problems with  
5 the medication refills; however, there is no evidence that Salyer disregarded Plaintiff's  
6 medical needs. Plaintiff's medical records reflect that Salyer re-issued prescriptions when  
7 necessary; that he monitored Plaintiff's condition, noting when his psoriasis started to flare  
8 (id., Salyer Decl. ¶¶ 15, 66, Attachs. 5, 55) and when it was greatly improved (id. ¶¶ 21, 65,  
9 Attachs. 9, 45); and that he adjusted Plaintiff's treatment accordingly (see id. ¶¶ 15, 66, 21,  
10 65).

11 Assuming, arguendo, that Salyer's failure to do more to address the medication delays  
12 raised a question as to deliberate indifference, Plaintiff must still show that harm resulted  
13 from Salyer's failure to act. See Jett, 439 F.3d at 1096. He does not have to demonstrate that  
14 his harm was substantial, as Defendants argue (see Doc. 52 at 7). See id.; McGuckin, 974  
15 F.2d at 1059 ("a finding that the defendant's activities resulted in 'substantial' harm to the  
16 prisoner is not necessary"). But he must establish that the harm suffered was not an "isolated  
17 exception" to the overall treatment he received during the time Salyer was treating him. Jett,  
18 439 F.3d at 1096 (if harm "is an 'isolated exception' to the defendant's 'overall treatment of  
19 the prisoner [it] ordinarily militates against a finding of deliberate indifference'" (internal  
20 citation omitted)).

21 Plaintiff's general allegations that he suffered "pain and suffering" and harm as a  
22 result of the medication interruptions and delays are insufficient to establish a genuine issue  
23 of material fact (see Doc. 9 at 4; Doc. 56 at 12). See Celotex, 477 U.S. at 324 (nonmovant  
24 must "go beyond the pleadings . . . and designate specific facts showing" a material factual  
25 dispute). The only specific harm Plaintiff identifies is his hospitalization in December 2007.  
26 With respect to his assertion that delays in medication resulted in the hospitalization, the  
27 HNRs that Plaintiff filed in the last few months of 2007 show that the only medication he did  
28 not consistently receive was TAC cream and that he went three weeks without it in

1 November (Doc. 53, Ex. C, Attachs. 19 (HNRs dated Sept. 11, Oct. 20, Nov. 6, 13), 26 (HNR  
2 dated Dec. 5)). Plaintiff specifically asserts that when he saw Salyer on December 12, 2007,  
3 Salyer responded by prescribing various medications to try to bring the psoriasis under  
4 control (Doc. 56 at 12).

5 As discussed above, the hospital medical records do not indicate that a lack of TAC  
6 cream or any other medication led to the need for hospitalization (Doc. 57, Attach. 12), and  
7 there is no other evidence in the record that suggests any such connection. See Hutchinson  
8 v. United States, 838 F.2d 390, 393 (9th Cir. 1988) (in medical cases where the plaintiff  
9 contests the type of treatment he received, an expert opinion will almost always be necessary  
10 to establish deliberate indifference). Plaintiff's conclusory allegations cannot create a  
11 material factual dispute, and the fact that Salyer responded to Plaintiff's needs precludes a  
12 finding of deliberate indifference. See Farmer, 511 U.S. at 837; Leer, 844 F.2d at 634. The  
13 Court will therefore grant Defendants' Motion for Summary Judgment.

14 Defendants' arguments pertaining to the Eleventh Amendment and damages need not  
15 be addressed, and Plaintiff's motion for counsel will be denied as moot.

16 **IT IS ORDERED:**

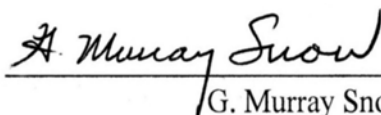
17 (1) The reference to the Magistrate Judge is **withdrawn** as to Defendants' Motion for  
18 Summary Judgment (Doc. 52) and Plaintiff's Motion for Appointment of Counsel (Doc. 64).

19 (2) Defendants' Motion for Summary Judgment (Doc. 52) is **granted**.

20 (3) Plaintiff's Motion for Appointment of Counsel (Doc. 64) is **denied** as moot.

21 (4) The Clerk of Court must terminate this action and enter judgment accordingly.

22 DATED this 27th day of May, 2011.

23  
24 

25 G. Murray Snow  
26 United States District Judge  
27  
28